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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT AND BRIEF FOR THE FEDERAL CROSS-APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-253

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

No. 87-431

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

No. 87-462

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

No. 87-775

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT AND BRIEF FOR THE FEDERAL CROSS-APPELLEE

Introduction

Appellees' responsive brief distinguishes itself among briefs filed with this Court, in two respects.[1] First, although defending the judgment of the district court, the brief is careful to avoid endorsing the legal rationale upon which that court relied. Second, fully half of the brief is devoted to a selective discussion of factual matters – not the facts as found by the court below, but rather selected facts revealed during discovery along with an enormous volume of other, inconsistent material that appellees never mention. These two features of appellees' brief confirm, first, that the reasoning of the district court is indefensible, and, second, that the proper resolution of this case awaits evaluation of a complex factual record, applying the principles enunciated in this Court's Establishment Clause cases.[2]

A. The District Court Erred in Holding the AFLA Unconstitutional

1. Appellees' factual assertions offer no basis on which to uphold the decision of the district court

Appellees seek to put before this Court, de novo, a body of evidence relating to the operation of the AFLA and to the conduct of particular grantees. They ask the Court to consider this material and, having done so, to ratify the constitutional holding of the district court. There are two reasons why the Court should decline to follow such a course. First, the district court's reliance on an unprecedented "direct and immediate" standard for identifying establishments of religion led it to make virtually no factual findings on any of the specific factual

[1] In both respects, however, it has much in common with the amicus briefs filed in support of appellees. No brief in this case has undertaken to support the reasoning of the district court, and most place heavy emphasis on facts as to which there were no findings below.

[2] Appellees do not dispute our contention (Appellant's Br. 31 n.24) that the district court erred in concluding that appellees have standing as taxpayers to challenge the AFLA as applied. Their possible standing as members of religious ministries (Appellees' Br. 5 n.10) was not addressed by the district court.

matters asserted by appellees. Second, the factual assertions raised at length by appellees are sharply contested. *Both* sides have submitted proposed findings and have supported those findings with detailed citations to the underlying testimony, affidavits, and exhibits. The Court is in a position to rely on specific factual findings only if it is prepared to make those findings itself.[3]

For example, appellees quote the testimony of one witness who expressed "surprise[]" (Br. 7-8) at the allegedly "high proportion [of] religious affiliation (30 or 40 percent)" and the "lack of experience" of the grant readers; they do not cite the testimony of the AFLA Director, who explained that she had selected readers based upon their experience and other credentials, and that religious affiliation was not a criterion for selection (R. 111, 106, 110, 119, 141-143, 265). Appellees cite (Br. 8 & n.15 (emphasis in original)) several readers' comments as evidence that the AFLA "was intended to *require* religious indoctrination"; they do not point out that those comments were a tiny fraction of the more than 6000 reader statements (R. 110, 187), that the Director could not recall even having reviewed any particular reader comments in making the actual grant awards (R. 111, 147), or that the Director was not bound by reader comments but instead made the final decisions based upon independent criteria unrelated to religious affiliation (*id.* at 149, 225).

Appellees cite (Br. 10-12) SeMo, Charles Henderson Child Health Center (CHCHC), and Memorial General Hospital Association as examples of secular grantees that were funded to use religious means to achieve AFLA goals; they neglect to cite any of the abundant evidence showing that each of those grantees operated lawful, secular programs, and that they involved religious groups, not in a doctrinal capacity, but as part

[3] Although appellees and some of the amici go quite far in inviting this Court to resolve factual disputes present in the record, and as to which the district court has made no findings, amici NOW et al. propose to go a good bit farther. In their "lodging," they ask the Court to evaluate materials that are not even part of the record and that have been gathered and submitted by amici for the first time to this Court. We have referred this material to HHS for its review and for whatever action may be appropriate.

of a broad array of community institutions through which secular services could be transmitted to the public (see, *e.g.*, R. 181 (Campbell decl.) 8-9; *id.* (Little decl.) 7, 11).[4] While appellees cite certain grant applications as evidence that "secular grantees promoted religion" (Br. 12 & n.24), they do not mention the evidence showing that, in practice, the cited programs were devoid of religious content (see *e.g.*, R. 181, 507006, 507008 (Hawaii program); *id.* at 517041-517122 (Lyon County); *id.* at 511005 (Tucson Unified School District)).

Similarly, appellees' claim (Br. 12-13) that AFLA programs presented religious material in the public schools turns on snippets wrenched from their context (see R. 181 (Vincent decl.) 7, 11 (University of South Carolina)), and broad mischaracterizations of the record (see, *e.g.*, R. 181 (Forliti decl.) 5, 8-9, 10, 12-13, 17; R. 125, 54-55, 83-85, 118-119, 127-128, 161-162, 167, 174, 177; R. 181 (Olson decl.) 4-11). Appellees cite (Br. 16-17) Catholic Family Services of Amarillo as a grantee that built its AFLA program on a religious base, but they omit the evidence showing that CFS's policies prohibit the imposition of religious doctrine on clients, and that its AFLA program did not in fact provide religious instruction (R. 181 (Watson decl.) 10, 11, 15, 18, 23).[5]

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[4] Appellees' assertion (Br. 11) that CHCHC used AFLA funds to promote a "Family Week" and "Family Sunday," in which pastors were encouraged to inculcate Christian values, is baseless. CHCHC sponsored a "Day of the Family" program, which took place on a Sunday, and ministers were asked to mention the event. That, however, was the only involvement of the clergy in the program. The event was not used to promote Christian values, and no AFLA funds were used to pay for it. R. 181 (Little decl.) 13-15.

[5] Similar overstatements or misstatements of the record abound. Thus, while appellees assert (Br. 18) that HHS permitted a religious curriculum to be taught in the Boston public schools, a reading of that curriculum shows it to be indisputably secular (R. 181, 711009-711209). Although one of the appellees' witnesses did assert that the medical care at St. Margaret's was inappropriate (Br. 21), another witness disputed that claim (J.A. 678). Appellees' contention that AFLA programs conveyed a link between the government and religion turns on statements taken out of context (see, *e.g.*, R. 181 (Vincent decl.) 10), and incomplete accounts of the record (see, *e.g.*, R. 181, 304029-304051). Appellees' suggestion (Br. 26 n.57) that one grantee was rejected because of a Methodist affiliation is mistaken. Indeed, Emory University, which is Methodist affiliated, was one of the AFLA grantees (R. 181, 312004-312005). While one of appellees' witnesses opined that religious pressure persuaded HHS not to renew the AFLA grant for the University of Arkansas (Br. 31), the AFLA Director testified that the decision was based on other grounds (R. 111, 165-166). And appellees assert (Br. 18) that teenagers at the St. Margaret's school were taught material "tailored to Catholic theology," but there is conflicting evidence that a purely secular curriculum was taught at the school (R. 231, 90-92, 111).

Notwithstanding appellees' allegations to the contrary, the district court manifestly did *not* find that "HHS injected religious bias into the grant-making process" (Br. 7), or that its "funding decisions ensured that religions and religious viewpoints would be advanced" (*id.* at 9). Nowhere in its decision did the trial court find that the government "funded secular grantees to use religious means to achieve AFLA goals" (*id.* at 10), or that "AFLA programs with a distinctly religious slant were presented to public school students" (*id.* at 12). Appellees are likewise unable to locate any findings to support the claims that HHS "funded grantees to build upon existing religious programs" (*id.* at 13), that it "condoned the promotion of religious doctrine" (*id.* at 18), or that AFLA programs have conveyed to the public at large "that the government supports religion" (*id.* at 22). And the district court expressly *rejected* the contention (J.S. App. 13a-15a), renewed nevertheless by the appellees (Br. 26), that the AFLA promotes certain religious denominations at the expense of others.

It remains our view that the task of resolving these factual disputes belongs, in the first instance, to the district court. Some of the disputes turn on credibility judgments; others depend on the weight of sharply conflicting testimony and exhibits. The issue before this Court is to prescribe the appropriate legal standard for evaluating the evidence adduced on both sides. In our view, the district court failed at the legal threshold, and, by virtue of an erroneous legal premise, never made the factual determinations upon which a correct judgment must eventually depend.

2. Appellees have not shown an impermissible effect

As we explained in our opening brief, this Court has articulated a two-prong standard for determining whether government aid has the impermissible effect of establishing religion. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973). Because it applied a quite different "direct and immediate" test, however, the district court explicitly refused to conduct either of the inquiries required by *Hunt*.

Appellees apparently do not subscribe to the district court's novel approach, but they defend the result on three grounds. First, they contend (Br. 32-37) that the AFLA funds specifically religious activity and religious institutions. Second, they argue (*id.* at 37-41 & App. C) that, in any event, the *Hunt* factors do not apply at all where the statute itself imposes "no restriction on the ability of the[] grantees to use federal funds to further their own religious missions." Third, they argue (*id.* at 41-45) that the inquiry as to the pervasively sectarian character of individual grantees either has been adequately made, or need not be made at all. Appellees are mistaken on all counts.

a. Appellees ask this Court to conclude that AFLA funds are in fact "earmarked" for sectarian activities (Br. 32), thus violating the prohibition against using government money for specifically religious purposes. Throughout their brief (Br. 10, 24-26, 26 n.56, 29-30) appellees argue that the statute promotes religious ends simply by funding services that are consonant with particular religious beliefs, and that any involvement of religious groups in teaching or counselling about matters on which they have religious views—however those services may be carried out—necessarily violates the "effects" test and unlawfully discriminates against other religions whose beliefs are not consistent with the objectives of the statute.

Appellees likewise portray the AFLA program as a clumsy, but deliberate effort to enlist the prestige and resources of the government in the indoctrination of religion. Without citation, appellees depict the AFLA as "a religious crusade against adolescent 'promiscuity' and abortion" (Br. 1) that was "intended * * * to convey a message of government endorsement of religion" (*ibid.*). Congress is charged (*id.* at 2) with having intended "to inject religious values and the power of religion into AFLA programs"—a proposition that even the district court could not accept (see J.S. App. 17a-22a).[6] And appellees repeatedly but misleadingly assert (Br. 2, 2 n.4, 3, 3 n.7) that the AFLA *requires*, not simply permits, grantees to involve religious organizations in the provision of funded services—a legal conclusion which they erroneously ascribe (*id.* at 3 n.7) to the district court,[7] and in support of which they cite (*id.* at 3) a willfully bowdlerized version of one of the statutory provisions.[8]

[6] Amici Unitarian Universalist Association, et al. go further and assert (Br. 10-19) that in enacting the AFLA Congress impermissibly discriminated among religions by offering funds only to those groups that were prepared to abide by the statutory restrictions on abortion counseling. The district court correctly rejected that contention (J.S. App. 13a-15a). Unlike the statute invalidated in *Larson* v. *Valente*, 456 U.S. 228 (1982), the AFLA does not make any "explicit and deliberate distinctions" (456 U.S. at 246-247 n.23) among religious institutions. Rather, it makes funds neutrally available to any group that is prepared to abide by the terms of the statute. The fact that some religious groups, as a matter of faith, cannot, or will not, participate in AFLA programs does not amount to a "denominational preference[] of the sort consistently and firmly deprecated in [the Court's] precedents" (*id.* at 246 (footnote omitted)). To the contrary, like the "conscientious objector" exemption upheld in *Gillette* v. *United States*, 401 U.S. 437 (1971), and the Sunday closing law upheld in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the AFLA has, at most, a " 'disparate impact among religious organizations' " that " 'result[s] from application of secular criteria' " (*Larson*, 456 U.S. at 246-247 n.23 (citation omitted)). As such, it is constitutionally permissible.

[7] In fact, the district court correctly construed Section 300z-5(a)(21) of the Act simply to "permit[] the involvement of religious organizations" in AFLA programs (J.S. App. 40a).

[8] Appellees misquote Section 300z-2(a) through the artful use of ellipsis. In their version, that provision is made to read: "[d]emonstration projects

Insofar as appellees mean to suggest that Congress cannot constitutionally enact programs that embody value judgments that are consonant with the tenets of particular religions, they are plainly wrong. Certainly the Establishment Clause does not invalidate statutory programs on the ground that the actions they direct also further goals of certain religions but not others. To the extent appellees are arguing that the involvement of any religiously affiliated organization in the AFLA program is itself an improper advancement of religion, they are equally incorrect. Outside the unique context of pervasively sectarian institutions, this Court's cases do not justify the extravagant (and possibly unconstitutional) presumption that persons will misuse grant monies simply because they have an affiliation with a particular religion.

Appellees' contrary assertion is not materially strengthened by the fact that, on isolated occasions, some religious allusions may have been made in a small number of AFLA programs. Aberrational examples do not amount to "specifically religious activity" under the Establishment Clause (see, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 758 (1976)), and, in any event, the trial court made virtually no findings on any of the factual allegations reproduced by appellees. Beyond that, even if a small number of programs were constitutionally infirm—a determination that must await a detailed consideration of all of the evidence bearing on each of the individual grantees—that could hardly justify a facial invalidation of the statute.

b. Appellees next claim that, in any event, the statute is unconstitutional because it does not contain an explicit prohibition on the use of funds for sectarian purposes. Such a conclusion is

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shall . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations" (Br. 3 (emphasis in original)). This expedient use of ellipsis spares the reader the burden of dealing with the more complex—and very different—language that actually appears in the statute. The statute does *not* say that projects shall make use of support systems such as religious groups, but rather that they "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems," including religious organizations.

unwarranted. The AFLA contains clear directives on how grants are to be used, and none of the statutory objectives involves religious indoctrination or other sectarian uses. The fact that the AFLA (or any other statute) does not expressly forbid the use of funds for unconstitutional purposes cannot be dispositive. It is certainly not reasonable to infer that Congress intended either to authorize uses different from the ones it explicitly provided for, or to allow the authorized functions to be carried out in a manner inconsistent with the Establishment Clause.

Bradfield v. *Roberts*, 175 U.S. 291 (1899), makes clear that a federal statute does not violate the Establishment Clause simply because it lacks a clause expressly forbidding the use of funds for religious purposes. In that case, a federal statute authorized building funds to be paid to a hospital previously incorporated "for the care of such sick and invalid persons as may place themselves under treatment and care of said corporation" (175 U.S. at 292). Although it assumed that the hospital was operated under the auspices of the Catholic Church and by members of a Church order, the Court found no constitutional infirmity in light of the statute's secular objectives. While "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the Court observed, "its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence" (*id.* at 298). The Court did not insist on a specific provision prohibiting religious use of the appropriated funds. Rather, it relied on the charter of the hospital itself, whose " 'specific and limited object' " was "the opening and keeping [of] a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation" (*id.* at 299-300).[9]

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[9] Appellees assert that *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (plurality opinion), "insist[s] on *statutory* safeguards" (Br. 39 (emphasis in original)), but nothing in the decision stands for that proposition. Moreover, the infirmity in the statute in *Tilton* was that the specific prohibition on religious use was limited to 20 years, suggesting that thereafter the religious institutions could devote buildings built with government funds to religious instruction or

Moreover, in administering the statute, the Secretary has incorporated in every grant award since 1984 (which includes all presently funded projects) an explicit prohibition on religious indoctrination. See J.A. 757, 759, 761. In light of that administrative practice, it cannot possibly make a difference of constitutional proportions that the statute itself lacks a similiar prohibition. The effects test focuses on the risk that funds will be channeled to sectarian purposes. It should make no difference whether a grantee is instructed by the Secretary to eschew religious indoctrination, or is so directed by the statute itself. Indeed, there are good reasons to believe that administrative oversight is more likely to ensure compliance with such strictures than the simple fact that the governing statute contains a restrictive clause. Individual grantees must deal with an administrator when they initially apply for a grant, when they receive their funding, and when they seek a renewal of the grant. That relationship is far more likely to deter abuses in the program than the simple presence of a prohibitory clause in the statute. Not surprisingly, this Court has consistently looked not only to the statute itself but also to provisions for administrative oversight in assessing the risk that government funds will be devoted to sectarian ends. See, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 741-743, 760-761 & n.22 (1976) (plurality opinion); *Hunt* v. *McNair*, 413 U.S. 734, 739-740, 744-745 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 675, 680 (1971) (plurality opinion).[10]

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worship (see 403 U.S. at 683). By contrast, the AFLA imposes a continuing obligation to use the appropriated funds for the secular purposes articulated in the statute.

[10] Appellees insist (Br. 39) that the prohibition in the grant awards on "teaching or promotion of religion" is too narrow to ensure secular use of AFLA funds. We see no meaningful difference between that formulation and the statutory prohibitions approved by this Court in *Tilton* (see 403 U.S. at 675), *Hunt* (see 413 U.S. at 736-737), or *Roemer* (see 426 U.S. at 740-741). This Court has generally assumed that grantees will act in good faith and "give a wide berth" to grant restrictions, in order to "minimize constitutional questions" (*Roemer*, 426 U.S. at 760 (footnote omitted)). There is no reason to depart from that presumption in the present case.

c. Appellees turn, finally, to the question that the district court should have addressed at the outset, but never did—whether AFLA funds have "flow[ed]" to pervasively sectarian institutions (*Hunt*, 413 U.S. at 743). They seek to deal with that question in two ways. First, they propose their own findings of fact (Br. 42-44)—claiming that at least three AFLA grantees were pervasively sectarian—and ask this Court to ratify those findings as if they had issued from the district court. Second, appellees contend that it is not necessary under this Court's cases to decide whether individual grantees are pervasively sectarian, because no such "detailed itemization" has been required under this Court's cases (*id.* 45), and because the mere possibility that pervasively sectarian institutions *could* be funded under the AFLA is enough to invalidate the statute (*ibid.*).

Except in passing, the trial court failed to consider the sectarian nature of individual grantees, and it did not identify a single grantee, sub-grantee, or unpaid participant in an AFLA program that it found to be pervasively sectarian.[11] Appellees ask this Court to make its own findings, at least with respect to three AFLA grantees. That task obviously belongs to the trial court in the first instance, since the underlying facts remain sharply in dispute. Moreover, even were three of the AFLA grantees pervasively sectarian, that would hardly justify the conclusion that "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, No. 86-87 (May 26, 1987), slip op. 5.

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[11] Appellees make an unavailing effort (Br. 43 & n.88) to locate findings in the district court opinion concerning the extent to which individual grantees were pervasively sectarian. The selected quotations demonstrate that the court regarded the entire inquiry as irrelevant in light of the "direct and immediate" standard. Typical of the district court's "findings" on this issue is the following remark (J.S. App. 33a (quoted in Br. 43 n.88)): "While the Court will not engage in an exhaustive recitation of the record, references to representative portions of the record reveal the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, or permitted the use of tax dollars for education and counseling that amounts to the teaching of religion."

Appellees next contend that the "pervasively sectarian" inquiry is unnecesary, because "this Court has never required such a detailed itemization" (Br. 45), and because the mere possibility that a pervasively sectarian institution *might* be funded is sufficient to strike down the AFLA on its face (*ibid.*). But this Court has indeed insisted on a detailed, case-by-case inquiry explaining that in order "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements" (*Roemer*, 426 U.S. at 758). See *id.* at 755-758; *Hunt*, 413 U.S. at 743-744; *Tilton*, 403 U.S. at 680.[12] Accordingly, the mere possibility that a grant program involving religious organizations *may* be misdirected "cannot, standing alone, warrant striking down a statute as unconstitutional" (*Tilton*, 403 U.S. at 679). As a plurality of this Court explained in the *Roemer* case, "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds" (426 U.S. at 761).

3. Appellees have not shown excessive entanglement

We demonstrated in our opening brief that the district court's failure to consider the sectarian nature of the individual AFLA

[12] Appellees read (Br. 45) *Meek* v. *Pittenger*, 421 U.S. 349 (1975), as authority for the proposition that the sectarian nature of individual grantees, or even the grantees as a whole, need not be established with the usual rigor required when a finding has constitutional implications. The case says no such thing. In striking down programs that provided teaching material and auxiliary services to nonpublic elementary and secondary schools, the Court observed that "more than 75%" of the schools were church-related or religiously affiliated and had a "predominant[ly] sectarian character" (421 U.S. at 364 (footnote omitted)). The Court explained (*id.* at 366) that "the primary beneficiaries" of the programs "typify * * * religion-pervasive institutions," and held (*ibid.*) that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." Plainly, no such findings have been, or, we contend, could be made, in the present case.

programs fatally impairs its decision on entanglement. That is true, we contended, for two reasons: first, because outside the context of pervasively sectarian institutions, monitoring by the government to ensure compliance with the terms of a grant is simple monitoring, not entanglement; and second, because only pervasively sectarian institutions are likely to require the extensive degree of monitoring that this Court has held to be constitutionally impermissible. Accord *Florey* v. *Sioux Falls School Dist. 49-5*, 619 F.2d 1311, 1318 (8th Cir.), cert. denied, 449 U.S. 987 (1980).

Appellees do not dispute, nor could they, the fact that the sectarian nature of a grantee is a "critical element[]" of the entanglement inquiry. *Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985). Moreover, while appellees are surely correct in observing that "the degree of sectarianism of an institution is to be considered 'cumulatively' " with other factors (Br. 46 (citation and emphasis omitted)), it does not follow that where there is no pervasively sectarian institution a finding of entanglement is nonetheless possible. Indeed, appellees do not point to any case in which this Court has found excessive entanglement outside the context of a pervasively sectarian institution. And appellees are further stymied by the fact that the district court did not even attempt to make findings on the sectarian characteristics of the grantees, so that a "cumulative" analysis of the individual grantees could be undertaken.

As before, appellees ask this Court to do the work of the trial court. They argue, for example, that "[t]he degree of sectarianism of an institution must be assessed in light of its religious tenets governing the aid at issue" (Br. 47), and they proceed to make a series of assertions about the sectarian characteristics of particular AFLA participants. It is these very assertions, however, that the litigation is about, and which the trial court found it unnecessary to resolve.[13]

[13] Appellees' assertion (Br. 51-53) that the AFLA has proved to be "political[ly] divisive[]" is unavailing, in light of this Court's holding in *Mueller* v. *Allen*, 463 U.S. 388, 403-404 n.11 (1983), that that concern "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."

B. The References in the AFLA to Religious Organizations, if Unconstitutional, Were Correctly Held to be Severable from the Other Provisions of the Act

If the Court concludes that the AFLA is unconstitutional insofar as it refers to "religious organizations," we believe that the district court's decision severing those references from the balance of the Act should be affirmed. A court should refrain from invalidating more of a statute than is necessary. " ' "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." ' " *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 5 (citations omitted). Accord *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *INS* v. *Chadha*, 462 U.S. 919, 931-932 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). " ' "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid" ' " (*Alaska Airlines*, slip op. 5 (citations omitted)). The district court correctly concluded (J.S. App. 52a-54a) that the references in the AFLA to "religious organizations" are severable from the balance of the statute.

1. Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 101, 108 (1980). Here, the language of the AFLA leaves no doubt that absent the references to "religious organizations," the balance of the statute is assuredly "legislation that Congress would * * * have enacted" (*Alaska Airlines*, slip op. 7).[14]

[14] Although there is no severability clause in the AFLA, that fact "does not raise a presumption against severability" (*Alaska Airlines*, slip op. 7). Accord *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion); *United States* v. *Jackson*, 390 U.S. 570, 585 n. 27 (1968). For reasons that are difficult to fathom, cross-appellants regard the absence of a severability clause as

The AFLA refers to "religious organizations" only four times (see 87-431 J.S. App. 53a; Appellant's Br. 3-4).[15] Two of those references appear in congressional findings that simply state that the problem of adolescent pregnancy is best addressed through a wide array of institutions – including, but not limited to, religious organizations. See 42 U.S.C. 300z(a)(8)(B), and 300z(a)(10)(C).[16] Although those findings (taken in conjunction with the many other findings articulated in the statute, see generally 42 U.S.C. 300z), generally identify the concerns that persuaded Congress to enact the legislation, the findings have no independent operational significance. Thus, if the findings were stripped of their passing references to "religious organizations," the remaining statute would obviously "function in a *manner* consistent with the intent of Congress" (*Alaska Airlines*, slip op. 6 (emphasis in original)). Cf. *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 23 (1981) (findings expressed in Developmentally Disabled Assistance and Bill of

evidence that "Congress intended religion to be an inseparable part of the AFLA" (Br. 59 n.118).

[15] Those four isolated references are a far cry from appellees' assertion (Br. 58 n.117) that "[t]he inclusion of religious organizations is interwoven throughout the AFLA."

[16] Section 300z(a)(8)(B) provides in part:

> The Congress finds that [the problems of adolescent premarital sexual relations, pregnancy, and parenthood] * * * are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

Section 300z(a)(10)(C) provides in part:

> The Congress finds that * * * services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.

Rights Act, 42 U.S.C. (1976 ed. & Supp. III) 6000 *et seq.*, "represent general statements of federal policy, not newly created duties").

The third reference to "religious organizations" appears in 42 U.S.C. 300z-2(a), which provides that "[d]emonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations." This provision makes no reference to the participation of religious organizations in AFLA programs; rather, it states that funded projects shall use methods that enhance "the capacity of families" to draw on "support systems," including, but not limited to, religious organizations. "With this subsidiary role allotted" to religious organizations in Section 300z-2(a) (*Alaska Airlines*, slip op. 9), it cannot be supposed that Congress would have declined to enact the statute had it known that this incidental reference to "religious organizations" would be struck down. See pp. 7-8 & n.8, *supra*.

The fourth and final reference to "religious organizations" appears in Section 300z-5(a)(21)(B), which is the only provision in the entire AFLA that actually indicates that religious organizations may themselves participate in funded programs. Section 300z-5(a)(21)(B) provides that applications for AFLA grants shall include "a description of how the applicant will, as appropriate in the provision of services * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." In two respects, the language confirms that Congress would have enacted the balance of the statute without this final reference to "religious organizations." First, prospective grantees are not *obligated* to involve religious organizations; they need only describe how they intend to involve those organizations "as appropriate." Accord R. 111, 19-21.[17] Second, religious organizations are included—as they

[17] Relying on the district court opinion and on a Senate Report, cross-appellants contend that under Section 300z-5(a)(21) "grantees do not have a choice about whether to involve religious organizations" (Br. 3 n.7). Neither authority supports that conclusion. Indeed, the district court correctly construed Section 300z-5(a)(21) simply to "permit[] the involvement of religious organizations" (J.S. App. 40a). And while there is some passing language in the 1984 Senate Report accompanying the re-authorization of AFLA funding (S. Rep. 98-496, 98th Cong., 2d Sess. 9-10 (1984)) suggesting that religious groups are required to be included in the program, the Conference Committee made clear that this Report should "not be considered as legislative history for the purposes of interpreting * * * the intention of the Congress with regard to * * * the Adolescent Family Life Act." H. R. Conf. Rep. 98-1154, 98th Cong., 2d Sess. 3 (1984).

are elsewhere (see 42 U.S.C. 300z(a)(8)(B), 300z(a)(10)(C), 300z-2(a))—as only one among "a wide array of educational, health, and supportive services" (42 U.S.C. 300z(a)(9)) whose combined efforts were required to deliver care and prevention services to adolescents in need. There is no reason to believe that Congress would have rejected the AFLA had it known that one aspect of that "wide array" would later be declared unconstitutional.[18] As a plurality of this Court observed in *Tilton* v. *Richardson*, 403 U.S. at 684 (footnote omitted), "[i]n view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect."[19]

[18] The Court has explained that where the valid remainder of a statute is "'fully operative as a law'" the invalid provision "is further presumed severable" (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234). The district court correctly determined (87-431 J.S. App. 54a) that "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.'"

[19] In other Establishment Clause cases, the Court has refused to sever unconstitutional provisions only where the lawful portions of the statute were so "minor" that it could not be "assume[d] that the [legislature] would have passed the law solely to provide such aid." *Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975). Accord *Sloan* v. *Lemon*, 413 U.S. 825, 833-834 (1973) (footnote omitted) (where "so substantial a majority" of the beneficiaries of state funding program were pervasively sectarian, "it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools").

2. The legislative history of the AFLA confirms the lesson of the text. As the district court explained (87-431 J.S. App. 54a), religious organizations were mentioned in the legislative history only once and, even then, only in the context of a broader discussion of the need for "community involvement" in AFLA programs. S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981). The Senate Report makes clear that "[r]eligious affiliation is not a criterion for selection as a grantee" (*id.* at 16). Rather, the Report emphasizes, religious organizations are included in the statute as "a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents" (*ibid.*).

The fact that Congress substituted the AFLA for the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Tit. VI, 92 Stat. 3595, and added, inter alia, an explicit reference in the statute to religious organizations, does not change the analysis. As we explained in our opening brief (at 23-24), and as the district court found (J.S. App. 21a), the AFLA amended Title VI to add references not only to religious organizations but also to "families, charitable organizations, voluntary associations, and other groups" (*ibid.*). Religious organizations were to be only one among many participants in AFLA programs; and there is utterly no evidence to support cross-appellants' assertion (Br. 58) that "[a] primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values." Cross-appellants have not carried the considerable burden of showing that it is "evident that the Legislature would not have enacted" the balance of the AFLA without the references to religious organizations.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the district court declaring the AFLA unconstitutional "insofar as the statute involves 'religious organizations' " (J.S. App. 46a) should be reversed. If the Court affirms that judgment, however, the further judgment of the district court severing those references from the balance of the statute should be affirmed.

Respectfully submitted.

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